

**It IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

<b>IN RE:</b>	§	
	§	<b>CASE NO. 19-51919-rbk</b>
<b>A’GACI, L.L.C.,</b>	§	
	§	<b>CHAPTER 7</b>
<b>DEBTOR.</b>	§	

**MOTION OF SIMON PROPERTY GROUP, INC. TO COMPEL COMPLIANCE WITH  
DEBTOR-IN-POSSESSION FINANCING ORDER AND PAYMENT OF POST  
PETITION RENT**

**This pleading requests relief that may be adverse to your interests.**

**If no timely response is filed within 21 days from the date of service, the relief requested herein may be granted without a hearing being held.**

**A timely filed response is necessary for a hearing to be held.**

Simon Property Group, Inc., as landlord or as managing agent for those landlords pursuant to leases with Debtor (“Landlord”), by and through its undersigned counsel, moves for entry of an order, in substantially the form submitted herewith as Exhibit “A”, compelling the compliance with the DIP Order entered by the Bankruptcy Court on September 9, 2019 and requiring the immediate payment of post-petition “stub rent” to Landlord as set forth therein.

**JURISDICTION AND VENUE**

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.
3. The statutory predicate for the relief requested herein is 11 U.S.C. §§ 105, 365(d)(3), 503(a), 503(b)(1)(S), and 507(a)(2).

## **BACKGROUND**

4. On January 9, 2018, the Debtor filed its first petition (“First Filing”) for relief under Chapter 11 of the United States Bankruptcy Code (“Bankruptcy Code”).

5. The Bankruptcy Court for the Western District of Texas, San Antonio Division (“Bankruptcy Court”), entered an order confirming Debtor’s plan of reorganization in its First Filing, on July 27, 2018. The Bankruptcy Court entered a final decree on April 15, 2019.

6. Debtor subsequently filed this Chapter 11 bankruptcy petition on August 7, 2019 (the “Petition Date”) as it was unable to perform under its plan of reorganization after the First Filing.

7. At the time of the Petition Date, the Landlord and Debtor were parties to non-residential real property leases at various properties as detailed on Exhibit “B” (the “Premises).

8. On the Petition Date, Debtor filed a Motion Seeking Entry of Interim and Final Orders Pursuant to 11 U.S.C. §§105, 361, 362, 363, 364, and 507 (I) Approving Postpetition Financing, (II) Authorizing Use of Cash Collateral, (III) Granting Liens and Providing Super priority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, (VI) Granting Related Relief, and (VII) Scheduling a Final Hearing (“DIP Motion”) [Docket 5], which provides in pertinent part that the “Debtor will use the proceeds of the DIP Facility to, among other things: (a) fund the administration of the Debtor’s Chapter 11 case; (b) fund the Debtor’s store closing sales; and (c) repay amounts outstanding under the Debtor’s Prepetition Facility.”

9. On September 9, 2019, the Bankruptcy Court entered an order approving the DIP Motion (the “DIP Order”) [Docket 144]. Section 53(b) of the DIP Order specifically provided for the payment of Store Occupancy (“stub rent”) in the amount of \$910,000 from proceeds under

the DIP Facility or from Cash Collateral. Additionally, Debtor represented to the Bankruptcy Court at the August 28, 2019 hearing (“Transcript”), attached hereto as Exhibit “C”, that stub rent would be paid no later than August 30, 2019. Landlord decided not to object to the DIP motion, in part, based on the direct representation by Debtor that the post-petition rent would be paid in full. However, Debtor has failed to pay the stub rent amounts to the Landlord as provided in the DIP Order and as noted in the Transcript at 32: 1-2. Section 506 (c) of the bankruptcy code allows a debtor to charge the cost of preserving or disposing of a secured lender’s collateral to the collateral itself. *See* 11 U.S.C. § 506(c). This provision ensures that the cost of liquidating a secured lender’s collateral is not paid from unsecured recoveries. *See, e.g., Precision Steel Shearing v. Fremont Fin. Corp. (In re Visual Indus., Inc.)*, 57 F.3d 321, 325 (3d Cir. 1995) (stating, “section 506(c) is designed to prevent a windfall to the secured creditor”); *Kivitz v. CIT Group/Sales Fin., Inc.*, 272 B.R. 332, 334 (D. Md. 2000) (stating, “the reason for [section 506(c)] is that unsecured creditors should not be required to bear the cost of protecting property that is not theirs”). Similarly, the “equities of the case” exception in section 552(b) of the Bankruptcy Code allows a debtor, committee, or other party-in-interest to exclude post-petition proceeds from pre-petition collateral on equitable grounds, including to avoid having unencumbered assets fund the cost of a secured lender’s foreclosure. *See* 11 U.S.C. § 552(b).

10. The Debtor and the Debtor’s estate are liable to the Landlord for certain stub rent and post-petition rent and charges under the Lease that are entitled to administrative expense status pursuant to Sections 365(d)(3), 503(a), 503(b) and 507(a)(2) of the Bankruptcy Code. The amount of the Landlord’s post-petition claim for rent and other charges is \$546,404.75 (specifically detailed on Exhibit “B”) accruing from the Petition Date through the effective date of rejection of August 31, 2019 (“Rejection Date”).

11. As Debtor conducted store closing sales in the Premises for the benefit of Debtor's estate, Landlord is entitled to payment of its administrative expense "stub rent" claims from the proceeds of the DIP Facility or from Cash Collateral as provided for in the DIP Order. Those funds identified in the DIP Order for the payment of the stub rent should be considered ear-marked specifically for the payment of these administrative expense obligations. Absent immediate funding of the stub rent in full as required under the DIP order and sufficient funding in a consensual budget that reserves funds for the payment of all Stub Rent and ensures (i) the immediate payment of the Stub Rent to the Landlord, the Debtors and secured lenders should not be allowed to waive their statutory ability to surcharge the Secured Lenders' collateral and/or recover costs, including Stub Rent, as adequate protection or under the equities of the case. *See, e.g., In re Mortgage Lenders Network USA, Inc.*, Hearing Transcript (Docket No. 346) at 20-21, Case No. 07-10146 (PJW) (Bankr. D. Del. Mar. 20, 2007) (recognizing that 506(c) waivers require creditor consent); *see also In re Townsends, Inc.*, Case No. 10-14092 (CSS) Hearing Transcript (Docket No. 338) at 23-25 (Bankr. D. Del. Jan. 21, 2011) (refusing to approve financing for a sale process that would leave the estate administratively insolvent); *In re NEC Holdings Corp.*, Case No. 10-11890 (PJW) Hearing Transcript (Docket No. 224) at 100 (Bankr. D. Del. July 13, 2010) (requiring that secured creditors pay the "freight" of the bankruptcy by ensuring an administratively solvent estate).

12. On October 6, 2019, the Bankruptcy Court granted the Motion filed by Seventh Avenue Capital Partners to convert Chapter 11 Case to Case under Chapter 7 [Docket 229]. Pursuant to the Order granting the Expedited Motion filed by Seventh Avenue Capital Partners, all rights, positions, statements, motions, and arguments asserted by any party in the Case on or prior to the date of entry of the Order survive the conversion to a Chapter 7 proceeding.

### **RELIEF REQUESTED**

13. The Landlord respectfully requests that the Bankruptcy Court enter an order granting this Motion and allowing payment of the administrative priority expense claim in favor of the Landlord in an amount not less than the total due per Exhibit “B” which represents the payment obligations arising or accruing under the Lease between the Petition Date and the Rejection Date pursuant to Bankruptcy Code Sections 365(d)(3), 503(a), 503(b)(1)(A), and 507(a)(2).

### **BASIS FOR THE RELIEF REQUESTED**

A. *The Landlord is entitled to Payment Pursuant to Section 365(d)(3) of the Bankruptcy Code.*

14. Section 365(d)(3) states the Trustee shall “timely perform all the obligations of the Debtor...arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected...” 11 U.S.C. § 365(d)(3).

15. Section 365(d)(3) gives administrative priority to lease obligations that arise post-petition. *In re Leather Factory, Inc.*, 475 B.R. 710, 714 (Bankr. C.D.Ca. 2012) (“Rent for the days after the filing of the petition until the next lease payment is due are an administrative claim under § 365(d)(3) in a prorated amount of a full monthly lease payment...To rule otherwise would reward the estate to detriment of the landlord, which was not the intent of Congress”).

16. Under Section 503(a) of the Bankruptcy Code, the Landlord is entitled to request payment of administrative expenses defined as “the actual, necessary costs and expenses of preserving the estate” 11 U.S.C. § 503(b)(1)(A). In order to satisfy section 503(b)(1)(A) a claim must: (1) arise from a debt incurred post-petition; (2) arise in connection with a transaction between the claimant and the debtor-in-possession; and (3) represent a debt

incurred to benefit the operation of the debtor's business." *In re Pacific Arts Publ.*, 198 B.R. at 322.

17. Pursuant to Section 105 of the Bankruptcy Code, the Court is empowered to effectuate the above substantive Code provisions and the terms of its DIP Order in a manner consistent with the representations made by the Debtor in advocating the DIP Motion. To do otherwise would withhold any perceived benefits for the Landlord that were represented to the Court through the DIP Motion and DIP Order.

### **CONCLUSION**

18. The Landlord respectfully requests that this Court enter the proposed Order, enforcing the DIP Order and compelling the Debtors and Trustee to pay Landlord's post-petition "stub rent" as detailed more specifically in Exhibit "B" (attached hereto).

**WHEREFORE**, Simon Property Group, Inc. respectfully requests that the Court enter an Order awarding the payment of post-petition "stub rent" and directing the Debtor to forthwith pay "stub rent", and provide the Landlord with such other and further relief as the Court deems just and proper.

November 6, 2019

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**COUNSEL FOR SIMON PROPERTY GROUP,  
INC.**

## **CERTIFICATE OF SERVICE**

I hereby certify that on November 6, 2019, a true and correct copy of the foregoing pleading is being served via this Court's ECF notification system to all parties registered to receive such notice as listed below.

/s/ Lynn Hamilton Butler

Lynn Hamilton Butler

### **CM/ECF NOTICE OF ELECTRONIC FILING**

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Form ID: pdfintp Total Noticed: 5

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**Exhibit A**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

<b>IN RE:</b>	§	
	§	
<b>A’GACI, L.L.C.,</b>	§	<b>CASE NO. 19-51919-rbk</b>
	§	
<b>DEBTOR.</b>	§	<b>CHAPTER 7</b>

**ORDER GRANTING MOTION OF SIMON PROPERTY GROUP, INC. TO COMPEL  
COMPLIANCE WITH DEBTOR-IN-POSSESSION FINANCING ORDER AND  
PAYMENT OF POST-PETITION RENT**

On this day, the Court considered the Motion of Simon Property Group, Inc. To Compel Compliance With Debtor-In-Possession Financing Order and Payment of Post-Petition Rent (“Rent Motion”). Having considered the merits of the Rent Motion, the Court finds the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. The Court further finds that venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The Court is authorized to grant the relief requested in the Rent Motion pursuant to 11 U.S.C. §§ 105, 365(d)(3), 503(a), 503(b)(1)(S), and 507(a)(2). The Court further finds that the Rent Motion to be meritorious based on the pleadings and presented evidence.

THEREFORE, the Court GRANTS the Rent Motion.

The Chapter 7 Trustee is authorized and directed to make the payment of post-petition “stub rent” and other charges to Simon Property Group, Inc. in the amount of \$546,404.75 (as specifically detailed on Exhibit “B” to the Rent Motion), which amount represents the post-petition rent accruing from the Petition Date through the effective date of rejection of August 31, 2019 (“Rejection Date”).

# # #

Order submitted by:

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INC.**

EXHIBIT B

Property ID	Property Name	Lease ID	Store Number	Outstanding Amounts
0145	Barton Creek Square	A//GA/1	DNE	\$28,703.16
0344	Broadway Square	A//GA//	0246-BWY	\$9,691.07
0511	Cielo Vista Mall	A//GA//	124	\$52,535.38
9862	Coral Square	A//GA//	270	\$24,140.30
5243	Del Amo Fashion Center	A//GA/1	249	\$13,302.38
8544	Florida Mall	A//GA//	221	\$75,873.35
7621	Houston Galleria	A//GA1/	199	\$5,624.37
1711	Ingram Park Mall	A//GA//	112	\$ 32,895.94
5217	Katy Mills	A//GA//	220	\$ 23,322.81
2546	La Plaza Mall	A//GA/1	127	\$ 100,066.40
2324	Lakeline Mall	A//GA2/	266	\$ 1,078.02
9780	Miami International Mall	A//GA/1	198	\$ 24,102.95
2580	Midland Park Mall	A//GA//	122	\$ 26,418.00
7908	Rio Grande Valley Prem Outlet	A//GA//	202	\$18,664.60
7982	San Marcos Premium Outlets	A//GA//	201	\$12,133.99
5229	Sawgrass Mills	A//GA//	217	\$54,978.18
8087	The Avenues	A//GA//	232	\$ 18,818.11
4739	The Domain II	A//GA//	123	\$ 819.84
5037	Woodfield Mall	A//GA//	212	\$ 23,235.90
			<b>Total</b>	\$546,404.75

EXHIBIT C

*Attempting to obtain transcript.*